

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

3)
4 In Re: Bair Hugger Forced Air) File No. 15-MD-2666
Warming Devices Products) (JNE/FLN)
5 Liability Litigation)
6)
7) Minneapolis, Minnesota
8) August 28, 2017
9) 9:59 a.m.
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9 BEFORE THE HONORABLE FRANKLIN L. NOEL
10 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
11 **(MOTION HEARING)**

12 APPEARANCES

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PROCEEDINGS

IN OPEN COURT

7 MR. GORDON: Your Honor, Ben Gordon for the
8 plaintiffs.

9 MS. ZIMMERMAN: Good morning, Your Honor.
10 Genevieve Zimmerman for the plaintiffs.

11 | THE COURT: Defendants.

12 MS. DAVIES: Good morning, Your Honor. Monica
13 Davies on behalf of defendants.

14 MS. AHMANN: Bridget Ahmann on behalf of
15 defendants.

20 MS. DAVIES: That's correct.

21 | THE COURT: Who's up, Ms. Davies?

22 MS. DAVIES: Yes. Thank you, Your Honor. I would
23 like to begin by addressing any confusion that there may be
24 regarding what it is we're seeking, the context in which it
25 arose, and the parties meet and confer efforts in that

1 regard. As the Court is aware, there has been a fair amount
2 of discussion between the parties, as well as with the
3 Court, in the context of questions regarding what
4 communications or what contact defendants are allowed to
5 have with treaters, whether they should be able to
6 communicate with plaintiffs' treating physicians, whether
7 for purposes of scheduling depositions or more substantive
8 discussions.

9 Plaintiffs have maintained from the beginning, and
10 my understanding is that they continue to maintain, that the
11 treaters are basically off-limits for defendants outside the
12 context of a formal deposition. We disagree, and we've had
13 discussions about the legal application of whether it be
14 under the physician-patient privilege or the Court's
15 analysis of *Shady Grove* and the extent to which the
16 Minnesota specific statute would apply here. We recognize
17 that those are difficult issues and sensitive issues in
18 light of the plaintiffs' medical conditions.

19 So in preparing to bring this motion before the
20 Court, we've attempted to narrow what we're looking for so
21 that we can best prepare, efficiently prepare for the
22 depositions that we're going to have coming up in a very
23 short amount of time, and that is simply what documents and
24 information have the treaters been provided by plaintiffs or
25 their counsel. We're not looking for substantive contact

1 with the treaters. We're not looking to get into any
2 specifics regarding the plaintiffs' medical condition
3 outside of what would normally be appropriate in the context
4 of a deposition in this type of case.

5 We know from the *Walton* litigation that
6 plaintiffs' counsel has previously at least attempted to
7 educate treaters regarding their theories of the case and
8 has worked with Dr. Augustine to try to find documents and
9 literature that would be helpful to those theories. We can
10 only assume that they would attempt to do the same thing
11 here. We simply want to know what -- we want a level
12 playing field. We want to know what it is that they've been
13 provided so that we can adequately prepare for depositions
14 going in.

15 Leaving aside other disputes that we may have over
16 over the scope or the applicability of the physician-patient
17 privilege and proceedings such as this, we don't think
18 there's any basis to claim that it would apply to those
19 sorts of communications. As I mentioned, and as the Court
20 is well aware, we have a lot of discovery and a lot of
21 depositions to get done in a very short timeframe and the
22 treaters are on that list and of anybody who have the
23 limit -- the most limited schedules in terms of what time
24 we're going to be allowed to have with them.

25 We've asked for the information before, despite

1 plaintiffs' claim in their opposition that we haven't --

2 THE COURT: So where -- so let's talk about that.

3 MS. DAVIES: Sure.

4 THE COURT: Because that does appear to be a major
5 dispute. What -- where do I find or what document requests
6 or what interrogatory or what discovery device were these
7 items requested?

8 MS. DAVIES: In our bellwether case-specific
9 document request to each plaintiff. And substantially
10 identical requests were served on everybody. There might be
11 some differences in numbering between each different case,
12 but I have, for example, the requests that were served upon
13 Julie Kamke, and we asked produce all documents and/or
14 communications, including correspondence or other written
15 records, provided by you, your agents, or your attorneys to
16 any witness in this litigation, including expert witnesses
17 and nontestifying experts who are consultants, but it
18 clearly encompasses any witness, and we would certainly
19 maintain that that would include their treating physicians
20 who were very likely to testify here.

21 THE COURT: So what were you reading from again,
22 so that's the interrogatory -- or the document request to
23 who?

24 MS. DAVIES: Julie Kamke, the first bellwether
25 case that's teed up.

1 THE COURT: Okay. And what document request no.
2 was it?

3 MS. DAVIES: It is request No. 15.

4 THE COURT: Okay.

5 MS. DAVIES: And I brought with me, just in case,
6 I brought with me copies of our response -- or our requests
7 as well as the responses served by Ms. Kamke.

8 THE COURT: Okay. And what was the response?

9 MS. DAVIES: They objected on the grounds of -- or
10 she objected on the grounds of work product privilege and
11 referred us to expert reports.

12 THE COURT: Okay.

13 MS. DAVIES: And, you know, quite frankly, we
14 recognize, as is the case with so many of these issues and
15 these motions, there are probably lot a different procedural
16 mechanisms that we could use to bring these issues before
17 the Court. We were in the context of discussions about the
18 applicability of the, you know, the privilege that applies
19 to plaintiffs' treaters and the extent to which we can
20 communicate with them. We wanted to talk to them ourselves.
21 The plaintiffs have taken the position we can't. We
22 disagree, but we are trying to find a way through it. We're
23 not going to talk to them ourselves and ask for this
24 information, then you give it to us, plaintiffs, please.

25 We're -- we didn't -- we weren't looking to tee up

1 any kind of discovery fight or motion to compel. We can
2 certainly go down that road if we have to. But the issue
3 that we're here before the Court on we think is very
4 discrete and can be dealt with in a much more efficient
5 manner, and that's simply whether we're entitled to at least
6 know what documents and information are being provided to
7 these witnesses in advance of their depositions.

8 And with that, unless Your Honor has any other
9 questions, I think --

10 THE COURT: I guess the only other question I have
11 is --

12 MS. DAVIES: Sure.

13 THE COURT: -- if we do get into the question of
14 privilege, why doesn't Rule -- Federal Rule 501 govern this
15 whole thing?

16 MS. DAVIES: I would submit that -- I -- we're
17 talking about discovery versus evidence and the
18 admissibility of it. I mean, regarding the privilege
19 itself, we would maintain that because of the nature of
20 these cases and the fact that it is the plaintiffs' medical
21 condition that is at the heart of it that they have waived
22 that privilege.

23 And from a procedural standpoint, we're simply
24 looking for the same access that Rule 26 would otherwise
25 provide. So our position with respect to the confluence of

1 the federal rules and the Minnesota physician privilege
2 statute is that, procedurally, we should be looking at Rule
3 26 in terms of what access to discovery and information we
4 have, and to the extent that we need to have evidentiary
5 fights based on what information is discovered, we could
6 cross that bridge when we come to it.

7 THE COURT: Okay. Thank you.

8 MS. DAVIES: Thank you.

9 MR. GORDON: Good morning, Your Honor.

10 THE COURT: Mr. Gordan.

11 MR. GORDON: Ben Gordan for the plaintiffs. Thank
12 you. Let me say first, Your Honor, I'm -- counsel for
13 defense indicated that they were -- there was some confusion
14 that she was hoping to clear up over this matter, and I
15 remain a little confused, although I understand, based on
16 her comments, that it seems to be a little narrower,
17 perhaps, than some of the statements in their memorandum.
18 But if I can just cut right to the -- well, let me say
19 preliminary, in terms of the meet and confer statement,
20 which I understand to be a rule that is required that we
21 meet and confer on these issues, I assume or I infer from
22 her comments, counsel's comments, that the meet and confer
23 is to be inferred here from the request to produce on case
24 specific matters to Ms. Kamke that she mentioned relating to
25 other witnesses, information from other witnesses.

1 I'm not sure that's a fair characterization, I'm
2 not sure it's a fair inference, and the statement that was
3 filed in the court was very clear that there was a meet and
4 conferral on this specific issue of disclosure, specifically
5 of documents that counsel may have given to plaintiffs'
6 treating physicians. That hasn't happened. There's been no
7 such meet and confer. I checked the transcript last week
8 carefully and cited in my response memorandum to portions of
9 it that might seem to cover that area, and I didn't see
10 anything that could obliquely be construed to ask us for
11 that information. I don't believe there's been an
12 appropriate request.

13 But to the extent that the request, No. 15, that
14 Ms. Davies mentioned is construed to include treating
15 physicians, I would argue, Your Honor, that those witnesses,
16 as case law in this district has pointed out, including the
17 *Baycol* MDL decision, are very different from ordinary fact
18 witnesses and the fact that Minnesota statutes specifically
19 and Minnesota Rules of Civil Procedure specifically create
20 that substantive right to privilege of those conversations
21 and those discussions between plaintiffs' counsel and
22 treating physicians for the plaintiffs in the case and the
23 procedure that defines the parameters of any such waiver.
24 And to that point, there has been a limited waiver in *Kamke*
25 and *Nugier* and the other cases, but it is very definite and

1 very limited, and, of course, prescribed. And given
2 Minnesota rules on that, I don't believe it can be
3 reasonably said that plaintiffs have waived their rights
4 under Minnesota substantive law.

5 And so while I'm happy to get into the question of
6 whether Federal Rule of Evidence 501 should govern here and
7 whether Minnesota law creates a rule of decision that I
8 believe it does, Your Honor, that's been recognized by this
9 district, I believe preliminarily the defendant's motion is
10 improper and that there hasn't been a proper meet and confer
11 that's happened and we haven't been given an appropriate
12 opportunity to respond to a specific request for such
13 communications.

14 But that said, given expediency and the
15 efficiencies that we all know and talk about with MDLs, I'm
16 certainly prepared to say, Your Honor, while I don't know
17 that it's a fair assumption, as counsel said, she said we
18 only can assume that conversations that took place in the
19 underlying *Walton* case have -- or conduct that may have
20 taken place in that case may have taken place in this case,
21 I think if we want to, you know, jump that hurdle and talk
22 about the substance of that, it's important to recognize on
23 the merits that any conversations that counsel has with
24 treating physicians are substantively protected under
25 Minnesota privilege law, under Statute 595.02.

1 And that counsel talked about wanting to be able
2 to be on an even playing field, the fact is, and the cases
3 talk about this, it's not an even playing field with respect
4 to whether or not Minnesota law recognizes a statutory
5 privilege for these conversations, and that right is in
6 violate, and our -- the duties for that, the reasons for
7 that law and that duty are talked about in great detail in
8 the *Baycol* decision and in other decisions.

9 And if we get into talking about other MDLs and
10 other minority positions like the *Zimmer NexGen* case, those
11 cases are very specifically limited to the confines and the
12 specific facts of those cases in terms of trying to find
13 treating physicians for -- or talk about physicians for
14 expert witnesses. I don't think we're there yet.

15 But my basic, you know, concluding response, Your
16 Honor, at this point is that Minnesota law governs here and
17 that there shouldn't be any encouraging under *Shady Grove*
18 into that law.

19 THE COURT: So why, other than the cases in Ramsey
20 County that are assigned to Judge Leary, why does Minnesota
21 law apply to any of these cases? In other words, as I
22 understand Rule 501, it says in a civil case where state law
23 provides the rule of decision, that's the privilege rule
24 that would apply, and so don't we have to look at all
25 3,500 cases and figure out what state law is going to govern

1 in each of those cases to determine what the privilege law
2 is in each of those cases?

3 MR. GORDON: I think ultimately that's true, Your
4 Honor. I think it is a state by state analysis, and --

5 THE COURT: And I would assume every state has
6 some kind of waiver notion for privilege, and why hasn't it
7 been waived in every state by reason of the fact that you've
8 put your clients' medical condition at issue and therefore a
9 treating physicians' opinion about that has to be explored,
10 doesn't it?

11 MR. GORDON: Well, the opportunity to explore it,
12 Your Honor, as the cases discuss, is at -- is in the
13 deposition setting, and those states like Minnesota
14 specifically define what the limits of such limited waivers
15 are. And in this instance, it is very clear and specific
16 what the plaintiffs have waived and what they have not
17 waived.

18 And, again, those decisions, including the *Baycol*
19 decision, the *NHL* decision in this district, talk about the
20 policy reasons for that, and it's bound up in the sanctity
21 of the privacy of the patients' medical records and the
22 relationship with the patient and the physician and the
23 protections built in, both for the patient and the physician
24 under that law. And yes, that varies state by state. And
25 that is -- I realize we are in an MDL setting, but there

1 have been many decisions, Your Honor, from Vioxx and others
2 forward, all the way most recently with the Xarelto
3 decision, that speak specifically to how that can be
4 handled. And if there are situations where there need to be
5 conversations between defense counsel and the plaintiffs'
6 treating physicians, number one, they should be limited to
7 the deposition setting. But number two, if there is a
8 stated reason by the defendants of need for something beyond
9 that, that can be done in a way that comports with state
10 law. That's something the Court can look at and other
11 courts have.

12 And specifically, in the *NextGen* case by Judge
13 *Pallmeyer*, the judge very carefully limited to the specific
14 facts of that case what the basis for her opinion was that
15 there should be these limited conversations with plaintiffs'
16 treating physicians on an *ex parte* basis. And Your Honor,
17 factually it's important there because they were looking at
18 a case where there were knee surgeons who were very few in
19 number, I think she mentioned 250 perhaps the defendants
20 argued might be the total number of available specialists in
21 knee surgery. So the defense argument there, very
22 specifically, which 3M has not made here, was that they had
23 to have some ability to reach out to treating physicians who
24 could be potential experts for them; whereas here, Your
25 Honor, there are thousands of anesthesiologists,

1 biosafety engineers, orthopedic surgeons, and others who 3M
2 could reach out to and, in fact, has, to be experts in this
3 case. In fact, Your Honor, 3M has named almost twice the
4 number of expert witnesses that plaintiffs have in this
5 case.

6 There's been no claim, I don't think there can be
7 a claim, that 3M has some necessity to have to reach out to
8 plaintiffs' treating physicians that would give them -- you
9 know, that they have a need for expert witnesses that would
10 give them a reason to ask the Court to create an exception
11 or to limit the scope of the physician-patient privilege
12 recognized by Minnesota Statute 595.

13 THE COURT: And document request 15 in the Kamke
14 case, in your estimation, only goes to what?

15 MR. GORDON: Your Honor, I don't have the specific
16 language in front of me. I tried to write it down. And I
17 would perhaps have to take a look at it if counsel has an
18 extra copy.

19 (Counsel conferred.)

20 MR. GORDON: As I recalled, let me -- if you may
21 indulge me for one moment, Your Honor.

22 THE COURT: Sure.

23 MR. GORDON: All communications, including
24 correspondence, other written records provided by you, your
25 agents, or attorneys to any witness in this litigation. I

1 would -- including expert witnesses and nontestifying
2 experts or consultants. The fact that plaintiffs' treating
3 physicians are a special, unique type of witness in this
4 case, as recognized by Minnesota substantive law -- and I
5 forget which case it is, Your Honor. I have to go back and
6 look. I believe it's *Baycol*, probably others, that
7 discussed that and the rationale for those witnesses not
8 being treated as ordinary fact witnesses. So in the case of
9 other third-party witnesses, this privilege wouldn't apply.

10 The reason that we believe this is -- this request
11 doesn't apply to plaintiffs' treating physicians is that
12 they have this privilege recognized by the law and that is
13 to be protected in violate under the case law, unless there
14 is some reason for them to get around that privilege.

15 And, again, we would argue that *Shady Grove* is
16 inapplicable here, that under Erie analysis, that if this is
17 not outcome determinative, Your Honor, it is at least
18 outcome influential or impactful. And the fact that in the
19 case law, including the Erie analysis under the *NextGen*
20 decision, talks at great length about the reasons that it
21 should be -- determined to be outcome determinative or not,
22 here, Your Honor, it is bound up in the patients' treatment
23 and core medical claims in this case. And so to say that
24 federal procedure is all that we're talking about here I
25 think misses the gravamen of the discussion in the *Baycol*

1 cases or the other cases. I think the core discussion
2 concerning Minnesota procedure makes clear when they talk
3 about 35.04, Minnesota Rule of Civil Procedure, that it's
4 more than mere procedure. It's more than routine procedure.
5 We're talking about a procedure that goes to the very heart
6 of the plaintiffs' medical treatment which is fundamentally
7 where their claims live and die.

8 THE COURT: But as I understand it, the request
9 and plaintiff -- and defendant contend that this request
10 No. 15 encompasses what they're looking for here, which is
11 simply communications from plaintiffs' lawyer to the
12 treating physician witness, so it doesn't really have
13 anything to do communications between the patient and their
14 physician or between the physician and the plaintiff. It's
15 simply the lawyer's communication to the witness. And by my
16 reading of the whole Erie line of cases and the Federal
17 Rules of Civil Procedure and the Federal Rules of Evidence,
18 this is all governed by Rule 501, which, by its terms, then
19 says you go look at the state law to determine what the
20 privilege is. And so what law governs Kamke and Newger?

21 MR. GORDON: Well, Your Honor, I -- obviously
22 I -- the state law for those plaintiffs would be the states
23 from which they hail, and in the case of Ms. Kamke it's
24 Wisconsin and in the case of Mr. Newger it's Florida. And I
25 agree that the laws of those states would govern under Rule

1 501 and create the rule of decision -- pardon me -- for
2 those states, and, you know, so to the extent that we need
3 to look at Florida, I think we can look at the Florida
4 analysis. The statute I think is substantially similar in
5 terms of the protection to patients' communications through
6 agents or otherwise but physicians.

7 And on that point, Your Honor, I think to the
8 extent that this request, and, again, I'm not sure I read it
9 as broadly or specifically as requesting communications
10 between patients and their agents and physicians, but in
11 this case, we, as attorneys, who may have had -- and without
12 admitting for the moment, Your Honor, that we've had any
13 such written communications with any doctor in the Kamke or
14 Newger cases, if we have or if we had, I -- our argument
15 would be that we -- those would be protected, and to the
16 extent that they are concerning the patient and their
17 relationship with that physician, the communications would
18 be protected just as though they were communications by the
19 -- from the patient to the physician themselves.

20 THE COURT: And is it your contention that the
21 only -- or that the extent of any waiver is set forth fully
22 in the HIPAA authorizations that each client signed with
23 their plaintiff fact sheets?

24 MR. GORDON: Yes, Your Honor. I mean, unless,
25 without knowing as I stand here now, there's any additional

1 room for discussion of waiver under Wisconsin or Florida
2 law, then yes, I believe those waivers are limited on their
3 face, they were agreed to by the parties, and that counsel
4 should not be allowed to seek discussions between patients
5 and their physicians or patients' representatives and their
6 physicians outside of the deposition context.

19 MS. ZIMMERMAN: I don't believe so. Sometimes
20 individual hospitals require, for example, the Mayo Clinic
21 has its own mandated authorization, but the authorizations
22 mandated in this MDL I believe appear as exhibits to
23 pre-trial order No. 14. I think that's the pretrial order.

24 MR. GORDON: That's right.

25 THE COURT: Okay.

1 MR. GORDON: And I have copies, Your Honor,
2 electronically that we can pull up and e-mail to the Court
3 if you wish.

4 THE COURT: And -- no, that's okay. If it's an
5 exhibit to pre-trial order 14, I can find that. I'll confer
6 with defense counsel and see if she agrees.

7 And what is the Florida statute section that's the
8 equivalent of the Minnesota statute that we were talking
9 about?

10 MR. GORDON: One moment, Your Honor. I can give
11 that to you. And then you're going to ask me for Wisconsin
12 next, and I'm --

22 THE COURT: 456.057, paren 8?

23 MR. GORDON: Yes, Your Honor.

24 THE COURT: Okay. Okay. Anything else?

25 MR. GORDON: Not at this time, Your Honor. Other

1 than to say that, again, I realize time is of the essence.
2 You know, I do think it's a bit of an unusual position for
3 us to be in procedurally when I don't believe we've truly
4 had a request. If you look at just the language of their
5 motions, they ask for disclosure of documents that they
6 haven't specifically requested in our view.

7 THE COURT: And in response to, for example,
8 Kamke, No. 15, was anything produced or was it just an
9 assertion of the privilege and no further documents or was
10 one of those --

11 MR. GORDON: I'm going look to Ms. Zimmerman.

12 THE COURT: -- despite the warning or despite the
13 privilege, blah, blah, blah, we now give you these?

14 MR. GORDON: With respect to 15 specifically, I'm
15 hoping Ms. Zimmerman knows, Your Honor.

16 MS. ZIMMERMAN: Your Honor, we asserted a broad
17 objection at the beginning of all of the responses that we
18 made. We answered and we referred to the expert reports
19 that were produced prior to the production of these
20 particular discovery responses.

21 And again, we haven't met and conferred such that
22 a motion to compel would be appropriate here. I mean, we
23 didn't know until this morning which requests it was they
24 thought that we had not been appropriately responsive to.

25 THE COURT: Okay.

1 MR. GORDON: And that's really -- thank you,
2 Ms. Zimmerman. The point is that if we'd had a real
3 opportunity to meet and confer specifically on the requests
4 they were talking about, I wasn't sure where that was coming
5 from. We didn't talk about it last week leading up to this
6 so I didn't know exactly. And that request, 15, I mean, I
7 think our response is that there's nothing that's not
8 non-privileged that's responsive to that request.

9 THE COURT: Okay.

10 MR. GORDON: Thank you, Your Honor.

11 | THE COURT: Ms. Davies, anything else?

12 MS. DAVIES: Yes, just very briefly, if I could.

13 I'll start at the end. The reason that we brought up the
14 discovery request in the first place is only because in
15 responding to our motion, plaintiffs took the position that
16 this -- that we had never asked for this in discovery. As I
17 mentioned, we're not looking for a discovery fight. We're
18 hoping to avoid one. And we think this issue is much more
19 discrete than maybe what we've even been talking about here.
20 So at the risk -- you know, to the extent that our motion
21 papers were not clear, I apologize to the extent that's the
22 case. The parties have different interpretations of the
23 scope of the privilege, and we recognize those are
24 sensitive, difficult issues and that time is of the essence.

25 What we're trying to do now, and what we've

1 requested in our motion, is, in our view, a much narrower
2 request than what we originally asked for and met and
3 conferred on with respect to contact with treaters. And at
4 this point, we're not looking to reach out to treaters
5 directly. We won't contact them without -- outside of
6 getting depositions on the calendar and communicating with
7 them in the deposition, we're not looking to have any kind
8 of substantive communication with them. We're not even
9 asking for documents or information relating to any specific
10 plaintiff or their medical condition as it might relate to
11 communications with a particular treater.

12 What we want to know before we go into depositions
13 is what, if any, documents that plaintiffs' counsel have
14 provided these treaters, whether in an attempt to educate
15 them or otherwise; for example, if plaintiff's counsel were
16 to, and I'm using this only as an example, I have no reason
17 to believe this is or is not the case, but if plaintiffs'
18 counsel were to hand a copy of the McGovern study to one of
19 these treaters or any number of the articles or other
20 literature put together by Dr. Augustine, I can't fathom a
21 basis on which the physician-client privilege -- the
22 physician-patient privilege would even come into play, and I
23 can't imagine any reason why that wouldn't be information
24 that we would be entitled to prior to going to the
25 deposition and potentially run the risk of being back before

1 Your Honor in the context of additional deposition time or
2 discovery.

3 THE COURT: Is it your contention that the waiver
4 of whatever physician-patient privilege might exist is
5 broader than the HIPAA authorizations that each plaintiff
6 signed in connection with their plaintiff fact sheets?

7 MS. DAVIES: I have to confess, I'm not -- I don't
8 have the language of the HIPAA authorization top of mind,
9 but our position is that because the plaintiffs have put
10 their medical condition at issue in these proceedings that
11 the privilege is waived, we're entitled to take discovery
12 from physicians, from treaters, from the hospitals, from
13 anestheologists, and we have -- we've got the plaintiff's
14 medical records. That, in our view, is not what the issue
15 is here. It's simply, you know -- and again, we're taking a
16 step back from our position that we should be able to have
17 conversations with these treaters, and we would view that
18 because of the plaintiffs putting their medical condition at
19 issue in this case, we would take the position that we would
20 otherwise be entitled to speak with those treating
21 physicians regarding plaintiffs' medical condition and the
22 facts and factors relevant to the damages that they're
23 claiming in these proceedings, but we're
24 not -- we've -- we've stepped back from that. We're not
25 asking for that. We're not asking for any patient specific

1 or plaintiff specific information at all at this point.

2 THE COURT: Is Ms. Zimmerman correct that the
3 HIPAA authorization is found attached to pre-trial order No.
4 14?

5 MS. DAVIES: I believe that is the case. I
6 can't -- I have no reason to disagree with it at this point,
7 but I would have to confirm.

8 THE COURT: And do you happen to know what the
9 Wisconsin statute is that's equivalent, if there is one, to
10 Minnesota 595.02?

11 MS. DAVIES: I do not.

12 THE COURT: And do you whether Mr. Gordon has
13 correctly identified the Florida statute?

14 MS. DAVIES: I have -- again, I have not looked
15 into the Florida -- that provision, but I have no reason to
16 dispute that he did.

17 THE COURT: Okay. Anything else?

18 MS. DAVIES: No.

19 THE COURT: Okay.

20 MS. DAVIES: Thank you.

21 THE COURT: Thank you.

22 MR. GORDON: Can I respond briefly, Your Honor?

23 THE COURT: Only if you're going to give me the
24 Wisconsin statute.

25 MR. GORDON: We are working on it as we speak,

1 Your Honor.

2 THE COURT: All right. Here's what we're going to
3 do. Before the day is out, meet and confer and see if you
4 can reach agreement now that you know what document requests
5 they say you haven't complied with and let me know by close
6 of business if you've reached an agreement, and if you have
7 not, I will issue an order ruling on the motion that is
8 before me.

9 MR. GORDON: Your Honor, if I may, thank you. In
10 anticipation of possibly not being able to work it out and
11 while we're waiting for the Wisconsin statute, can I give
12 you one more citation to consider when you make your ruling?

13 THE COURT: One more citation to what?

14 MR. GORDON: For the proposition in response to
15 what Ms. Davies just said a moment ago about their -- it
16 being unfair essentially for them not being able to speak
17 with the physicians and know what the physicians --

18 THE COURT: I think I understand that issue and
19 understand everybody's position. What I'm more interested
20 in is exactly what state's privilege laws might actually I
21 might have to learn and talk about.

22 MR. GORDON: Understood, Your Honor. We'll find
23 that for you hopefully momentarily.

24 THE COURT: All right. We are in recess.

25 MR. GORDON: Thank you, Your Honor.

1 MS. DAVIES: Thank you, Your Honor.

2 (Proceedings concluded at 10:31 a.m.)

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7 I, Staci A. Heichert, certify that the foregoing is
8 a correct transcript from the record of proceedings in the
9 above-entitled matter.

10

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Certified by: s/ Staci A. Heichert

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Staci A. Heichert,
RDR, CRR, CRC

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